KERTIH PORT SDN BHD

v.

OWNERS OF THE VESSEL "SHEMA"

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ADMIRALTY IN REM NO: (D3) D4-27-30-2001]
12 DECEMBER 2008

ADMIRALTY AND SHIPPING: *Service - Writ in action in rem and warrant of arrest - Service on master of vessel - Whether service on property - Whether non-compliance with O. 70 rr. 7 and 10 Rules of the High Court 1980 - Whether O. 1A of rules applicable - Whether justice of case overrides non-compliance with rules*

ADMIRALTY AND SHIPPING: *Jurisdiction - High Court - Whether admiralty jurisdiction improperly invoked - Notice of discontinuance of action in rem - Whether abuse of court process - Whether court process used as tool for advantage*

ADMIRALTY AND SHIPPING: *Warrant of arrest - Damages for wrongful arrest - Whether owners of vessel under arrest entitled to wasted costs and unnecessary expenses while vessel under arrest*

On 10 November 2001, the plaintiff commenced an Admiralty action *in rem* against the defendant's vessel "Shema" for an alleged breach of contract for the hire of two tugboats pursuant to a letter of award executed between the parties. The plaintiff served a writ of summons *in rem* and a warrant of arrest on the Master of the said vessel. The said vessel was arrested as security for the plaintiff's claim against the defendant. The defendant issued an immediate notice to the plaintiff that the execution of the warrant of arrest was wrong and without basis. About 104 days later, the plaintiff filed a notice of discontinuance of the action and procured the release of the said vessel from arrest. At the time of the plaintiff's filing of the notice of discontinuance and release, the defendant's applications to set aside the writ and warrant of arrest and for orders for the sheriff to maintain the said vessel were pending hearing before the court. The defendant then sought an order that the plaintiff's discontinuance of the action be set aside and that all wasted and unnecessary expenses incurred by the defendant whilst the said vessel was under arrest be assessed and paid by the plaintiff as sheriff's costs and expenses. There were

two main issues before the court: (1) whether the Admiralty jurisdiction of the court was wrongly and/or improperly invoked by the plaintiff as the service of the writ *in rem* and warrant of arrest was served on the Master of the said vessel; and (2) whether the defendant was entitled to damages for the wrongful arrest of the said vessel, alternatively, the defendant be reimbursed of wasted and unnecessary expenses whilst the vessel was under arrest at the plaintiff's instance.

Held (in favour of the defendant):

(1) Order 70 r. 7 Rules of the High Court 1980 ('RHC') contains a mandatory requirement that the writ must be served on the property against which the action is brought. Rule 10 provides that the service of a warrant of arrest or writ in an action *in rem* against a ship, freight or cargo shall be effected by (a) affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and (b) on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship. However, the affidavit of service of the writ herein showed that the writ was served on the Master of the said vessel and not as required by rr. 7 and 10 of O. 70 RHC. (para 9)

(2) Order 1A of the RHC came into effect *via* P.U. (A) 197/2002 on 17 May 2002. Hence, it was not applicable to the present case. Prior to O. 1A, the Rules were strictly applied, resulting in injustice and hence the need for the said O. 1A. A strict, literal and blind application of the rules of court has never been the law. The guidelines for the exercise of judicial discretion under the rules of the court had been set out in *Veerasingam v. Public Prosecutor* and approved by subsequent case authorities. (paras 10, 11 & 12)

(3) Both rr. 7 and 10 of O. 70 RHC use the word "shall". Its use means that the rules are mandatory. No other form of service is prescribed. It followed that it must be complied with. The prescribed service under rr. 7 and 10 are clearly consistent with the *in rem* nature of the action. Service upon the Master of the vessel is not *in rem* in nature upon the vessel but upon the Master. (paras 13 & 14)

(4) The writ of summons *in rem* is a special procedure applied *in rem* to ships that move in and out of Malaysia. These ships are not necessarily registered in Malaysia or owned by Malaysians but their entry into and departure out of Malaysia on time and on schedule affect the very lifeblood of trade upon which the modern global economy and particularly that of Malaysia is dependent. Foreign ships, owners and parties shipping goods expect compliance with the rules, for they conduct their operations on that basis. To use the writ *in rem* to hold a ship while claims and negotiations for settlement are being made and then releasing the same at will 104 days later is a defective application of the rules. That creates the image of a nation which allows its laws and rules to be used for collateral if not improper purposes and damages Malaysia's reputation generally as a trading nation. That is too high a price to pay by the nation for one plaintiff. (para 16)

(5) Even if O. 1A RHC is applicable, it must be observed that nothing in O. 1A suggests all breaches must be treated as mere irregularities. Order 1A requires consideration of the justice of the case. A consideration of the justice of the case should touch upon the background that precipitated the plaintiff's action. The defendant had initially commenced a civil action against the plaintiff for breach of contract ('the Dagang 5 suit'). The plaintiff, in its defence, contended that it was the defendant who had breached the contract and not the plaintiff. The plaintiff then commenced the present action. The cause of action, facts, subject matter, parties and issues for determination in the present action were identical to that of the Dagang 5 suit. The Dagang 5 suit was not disclosed by the plaintiff and thus did not assist the plaintiff as to the *bona fides* of the present action. The court could not accept the plaintiff's submission that it could employ the legal process to obtain maximum advantage. The process of the courts were provided for the purpose of being employed in good faith for the expeditious and economic resolution of *bona fides* disputes, by focusing firstly upon getting the facts right in order to deliver a resolution that was fair and just. It was not a tool for advantage. (paras 17, 18, 19 & 20)

(6) The original dispute between the parties arose from the occurrence of the financial crisis in 1997 between the time of negotiations and the issue of the letter of award. As a result of the financial crisis, the Government of Malaysia altered the exchange rates that affected contract pricing. The change in the exchange rates was not the variations in the ordinary course of business but from about RM2.45 to RM3.58 to the US dollar. (para 21)

(7) The justice of the case did not warrant that the service on the Master of the vessel was sufficient compliance with O. 70 RHC. Upon failure to comply with that mandatory requirement, the consequence was that the service of the writ *in rem* and the warrant of arrest on the Master of the said vessel was defective and liable to be set aside. (paras 22 & 23)

Case(s) referred to:
Hamp-Adams v. Hall [1911] 2 KB 942 ***(refd)***
Mohamed Suboh v. Devadas [1980] 1 LNS 201 ***(refd)***
PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***
PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1957] 1 LNS 53 ***(refd)***
Rolimpex Centrala Handlu Zagranicznego, Willy Brims, And R Kamstra (Hull) Ltd v. The "Prins Bernhard" (Owners) [1963] 2 LLR 236 ***(refd)***
The "Ralph Misener" [1997] ACWSJ Lexis 153296 ***(refd)***
Veerasingam v. PP [1957] 1 LNS 93 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 70 rr. 7, 10

For the plaintiff - TH Liew (SY Ho with him); M/s TH Liew & Partners
For the defendant - Mathew Kurien; M/s Sativale Mathew Arun

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] The matters before the court were as follows:

a. Enclosure 15: Defendant's application to set aside writ and warrant of arrest.

b. Enclosure 18: Defendant's application for orders for sheriff to maintain vessel.

c. Enclosure 47: Defendant's application to set aside notice of discontinuance,

[2] The plaintiff Kertih Port Sdn Bhd had on or about 10 November 2001 commenced this admiralty *in rem* action against the vessel "Shema" ("the vessel") for a claim for an alleged breach of contract for the hire of two tugboats pursuant to a letter of award executed between the parties. The vessel was arrested at the instance of the plaintiff as a security for its claim under an action filed by the plaintiff. The vessel was arrested at Port Klang on 10 November 2001, at the request of the plaintiff. On or about 12 November 2001, Messrs Liow & Co, the former solicitors of the defendant in this action, issued an immediate notice to the plaintiff's solicitors informing that the execution of the warrant of arrest against the vessel "Shema" was wrongful and without basis.

[3] Subsequent to the arrest of the said vessel in this action, the plaintiff through its solicitors had on 13 November 2001 and 20 November 2001 demanded the defendant to furnish alternative security for its claim in the sum of RM2,384,000 to secure the release of the vessel "Shema" from arrest.

[4] After keeping the vessel under arrest for about 104 days, the plaintiff filed a notice of discontinuance of the action and procured the release of the vessel from arrest. At the time of filing of the notice of discontinuance and release, encl. Nos. 15 and 18 filed by the defendant, were pending hearing before this court.

[5] The abrupt discontinuance of the action by the plaintiff left the defendant without any reparation, in particular as to costs of the action and/or recovery of all unnecessary and wasted expenses incurred by the defendant whilst the vessel was under arrest for about 104 days. Accordingly, the defendant by encl. 47, sought an order that the plaintiff's notice of discontinuance be set aside and that all wasted and unnecessary expenses incurred by the defendant whilst the vessel under arrest be assessed and paid by the plaintiff as Sheriff's costs and expenses.

A **[6]** The notice of discontinuance was set aside by agreement of the parties. Mr. T.H. Liew for the plaintiff informed the court there was no objection to payment of costs to the date of discontinuance. Setting aside the notice of discontinuance, the court deferred decision on other prayers in encl. 47 until decision
B on encls. 15 and 18. Except for prayer 5, the remaining prayers in encl. 47 are similar to prayers in encls. 15 and 18. Hence, prayer 5 was considered as an alternative prayer to damages for wrongful arrest of the vessel. Further, the defendant did not proceed with prayers 1, 5 and 7 of encl. 15 for reason they had
C become academic. Similarly, since the plaintiff had voluntarily released the vessel from arrest, the majority of prayers sought in encl. 18, save for prayer 7 pertaining to the issue of costs and unnecessary/wasted expenses whilst the vessel was under arrest, had also become academic.

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[7] The remaining prayers pertain to prayers 2, 3, 4 and 6 of encl. 15, prayer 7 of encl. 18 and prayer 5 of encl. 47, and the two main issues are:

E a. whether the admiralty jurisdiction of this court has been wrongly and/or improperly invoked by the plaintiff in that the writ of summons *in rem* and warrant of arrest issued against the vessel "Shema" and the service thereof must be set aside; and

F b. whether the defendant is entitled to damages for the wrongful arrest and wrongful continuance of arrest of the vessel "Shema" alternatively defendant be reimbursed of wasted and unnecessary expenses whilst the vessel under arrest at the instance of the plaintiff.

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[8] The first issue was founded upon the argument that the service of the writ of summons *in rem* and the warrant of arrest on the vessel "Shema" was bad in law since O. 70 rr. 7 and 10 of the Rules of the High Court 1980 which prescribe the rules as
H to the service of a writ *in rem* and the execution of the warrant of arrest had not been followed.

[9] The said r. 7 contains a mandatory requirement that the writ must be served on the property against which the action is
I brought. Rule 10 provides that, service of a warrant of arrest or writ in an action *in rem* against a ship, freight or cargo shall be effected by: (a) affixing the warrant or writ for a short time on

any mast of the ship or on the outside of any suitable part of the ship's superstructure; and (b) on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship. However, the affidavit of service of the writ of summons *in rem* of Mohamad Nasir bin Mohd and Zainuddin bin Ismail affirmed on 12 November 2001 shows that the writ *in rem* was served on the master of the vessel "Shema" at Port Klang on 10 November 2001 and not as required under rr. 7 and 10 of O. 70 RHC.

[10] I have considered the question whether the non-compliance is mere technical non-compliance. Now, O. 1A of the Rules of the High Court 1980 came into effect under PU(A) 197/2002 from 17 May 2002. Hence, it is not applicable to this case. The general wisdom seems to suggest that prior to O. 1A the Rules were applied strictly, resulting in injustice, hence the need for O. 1A. A strict, literal and blind application of the rules of court has never been the law. Guidance in the exercise of judicial discretion under the rules of court had been set out by no less than Thomson CJ in *Veerasingam v. Public Prosecutor* [1957] 1 LNS 93:

> Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent.

[11] This passage was quoted and approved by the Federal Court in *Mohamed Suboh v. Devadas* [1980] 1 LNS 201 where it was stated that even though the decision of Thomson CJ was in a criminal reference, it applied with equal force to matters of civil procedure.

[12] The decision in *Mohamed Suboh v. Devadas* contained the grounds of decision of Ajaib Singh J who set out four categories of rules:

> I can think of four categories of the rules. First the rules which are minor or technical. Non-compliance with such rules will not vitiate the proceedings. For example failure to give notice of intention to use any affidavit under Order 38 rule 20 of the Rules of the Supreme Court may well be considered as a mere irregularity not rendering the proceedings void. In the second category are those rules which prescribe periods of time within which to file and deliver pleadings or other documents in civil proceedings. Extension of time is generally granted in such a case on terms if the granting of the extension does not put the other party to the proceedings at any disadvantage. The third category of rules are those which must be strictly complied with before a person can obtain any relief in court. Order 14 is a good example of this category of rules. The affidavit in support of an application for summary judgment must fulfil strictly the conditions set out in rule 1(a) of Order 14. If the affidavit is deficient for want of compliance with this rule the application for summary judgment will be dismissed unless the position is rectified by a supplementary affidavit. Lastly there are the rules which relate to civil appeals from the decisions of the lower courts. These rules prescribe the time within which to file a notice of appeal and the memorandum of appeal and the service thereof and of the appeal record on the respondent to the appeal. These rules must be complied with. In the interest of justice however the court may extend time but only if sufficient ground is shown for the delay. What amounts to sufficient ground will depend on the facts and circumstances of the particular case.

[13] Both rr. 7 and 10 use the word "shall". Its use means that the act specified is mandatory: see *Mohamed Suboh v. Devadas* [1980] 1 LNS 201 FC; *Public Prosecutor v. Yap Min Woie* [1995] 4 CLJ 692 FC.

[14] No other form of service was prescribed. It follows it must be complied with. The prescribed service under r. 7 and r. 10 are clearly consistent with the in rem nature of the action. Service upon the master of the vessel is not *in rem* in nature upon the vessel but upon the master. In *Rolimpex Centrala Handlu Zagranicznego, Willy Brims, And R. Kamstra (Hull). Ltd. v. The "Prins Bernhard" (Owners)* [1963] 2 LLR 236 service on the master, which was impressed on him as good service, the judge

said "it is too great a departure from the recognized and long established practice". Caution must be placed upon reliance on the Canadian case of *The "Ralph Misener"* [1997] ACWSJ Lexis 153296; [1997] ACWSJ 413748; 68 ACWS (3d) 803 as it does not appear to be an *in rem* process.

[15] As to non-compliance with, in particular, a mandatory rule of court, brings to mind *P T Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd* [1957] 1 LNS 53 in which the following extract from the decision of Rigby J in *Hamp-Adams v. Hall* [1911] 2 KB 942 was set out:

> On the authorities it seems abundantly clear, therefore, that where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court will set aside a judgment obtained by default where the requirements have not been complied with.

[16] I take into consideration also the fact that the writ in summons *in rem* is a special procedure applied *in rem* to ships that move in and out of Malaysia. These ships are not necessarily registered in Malaysia or owned by Malaysians, but their entry into and departure out of Malaysia on time and on schedule affect the very lifeblood of trade upon which the modern global economy, and particularly that of Malaysia is dependent. Foreign ships, owners, and parties shipping goods expect compliance with the letter of the rules, for they conduct their operations on that basis. Tolerance of defective application of the rules to allow the use of the writ *in rem*, to hold a ship while a claim and negotiations for settlement is made, and then releasing the same at will 104 days later, creates the image of a nation which allows its laws and rules to be used for what may be termed collateral if not improper purposes, and thus damage Malaysia's reputation generally as a trading nation. That is, in my view, too high a price to pay by the nation for one plaintiff.

[17] Even, if O. 1A is applied, it must be observed that nothing in O. 1A suggests all breaches must be treated as mere irregularities. Order 1A requires consideration of the justice of the case. In such case, the categories set out by Ajaib Singh J above, in my view, remain relevant in the consideration of the justice of the case.

[18] If the arrest and subsequent unilateral release 104 days later of the vessel did not raise legal eyebrows, that the plaintiff having drawn down upon a sum of RM379,000 on two bank guarantees or performance bonds both dated 14 August 2000, on 27 June 2001 and 25 July 2001 returned the sum to the bank on 20 February 2000. The defendant received this information on 9 April 2002 not from the plaintiff but from the bank. The calls upon the guarantee was made even before the plaintiff issued its solicitor's notice of termination of contract to the defendant on 11 September 2001.

[19] A consideration of the justice of the case in whether to accept service upon the master of the vessel in Port Klang as sufficient compliance with the requirements of O. 70 of the Rules would not be complete if one does not touch upon the background that precipitated the plaintiff's actions.

[20] On 10 October 2001, the defendant had commenced a civil action against the plaintiff in the High Court of Malaya (Commercial Division) at Kuala Lumpur Suit No: D5-22-1768-2001 claiming damages for breach or breaches of contract by the plaintiff under the letter of award dated 15 December 1997. The plaintiff contended in its defence in the Dagang 5 Suit it was the defendant who had breached the terms of the said letter of award and not the plaintiff. The plaintiff commenced this action on 10 November 2001. The day before that the plaintiff had filed its defence in the Dagang 5 Suit. From a perusal of the endorsement on the writ of summons and the pleadings filed in the Dagang 5 Suit, it appears clear that the cause of action, facts, subject matter, the parties and issues for determination are identical to the writ *in rem* in this action. The Dagang 5 Suit was not disclosed by the plaintiff. This does not assist the plaintiff as to the *bona fides* of its action in this suit. The court cannot accept the plaintiffs submission that it could employ the legal process to obtain maximum advantage. The process of the courts are provided for the purpose of being employed in good faith for the expeditious and economical resolution of *bona fide* disputes, by focusing firstly upon getting the facts right in order to deliver a resolution that is fair and just. It is not a tool for advantage.

[21] The original dispute between the parties arose from the occurrence of the financial crisis in 1997 between the time of negotiations and the issue of the letter of award. As a result of the financial crisis, an unexpected occurrence took place. The Government of Malaysia altered the exchange rates. It affected contract pricing. The change in the exchange rate was not the variations in the ordinary course but from about RM2.45 it was altered to RM3.58 to the US dollar.

[22] In all the circumstances, the justice of the case does not warrant the acceptance of service upon the master of the vessel as sufficient compliance with O. 70.

[23] Upon failure to comply with the mandatory requirement, the consequence is that the service of the writ *in rem* and the warrant on the master of the ship is defective and liable to be set aside.

[24] In the event, the court allowed prayers 2, 3, 6 and 8 of encl. 15 and prayer 5 of encl. 47.